

¹The court will not set forth the procedural history herein as it is sufficiently covered in the report and recommendation of the magistrate judge

assaulted by gang relatives of the family of his rape victim. He bases this fear primarily on a letter he received from the rape victim, Shanay Morrison. In that letter, she advised Miller that the father of her child was in the same prison. (Doc. 66-1, Ex. A at p. 32.) The father was not identified by Morrison. (*Id.* at p. 34.) There is nothing in the record to show that any assault on Miller was done by this unidentified father of the baby of Shanay Morrison.

Miller was twice assaulted in June 2012 (Doc. 66-1, Ex. A at p. 39), and once in July 2012. During those incidents, Miller only knew the nickname of one of the assailants (*id.* at p. 40). As to the July incident, Miller claims that Thomas Ryas was one of the assailants (*id.* at p. 44). However, this name was not presented to the prison authorities until September 10, 2012 (*id.* at p. 48). The other assailants were not identified to the authorities until sometime between July 23 and August 23, 2013 (*id.* at p. 49). Miller was confined in the RHU from July 24, 2012 until May 14, 2013.

Miller was interviewed by Defendant Yackel concerning the alleged assault on July 7, 2012 but Miller could not provide the names of persons who allegedly assaulted him. Miller was interviewed again on July 19 and 24, 2012 and gave no information regarding his assailants (Doc. 66-1, Ex. B). The institution was not able to do a proper investigation into assault charges without help from Miller.

An Eighth Amendment claim against prison officials must meet two requirements: (1) the deprivation alleged must be objectively, sufficiently serious; and (2) the prison official must have a sufficiently culpable state of mind. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Plaintiff must produce evidence of a substantial risk of serious harm and that the defendants were deliberately indifferent to that risk.

Davis v. Williams, 354 Appx. 603, 605-06 (3d Cir. 2009). Kellner, Yackel and Tritt did not protect Miller from assaults by other inmates prior to July 24, 2012 as Miller could not provide them with the identity of his assailants nor the specific threats against him. The court will adopt the report and recommendation of the magistrate judge on this issue.

B. Plaintiff's Motion for Leave to File a Third Amended Complaint

The magistrate judge also recommends that Plaintiff's motion for leave to file a third amended complaint be denied. This recommendation will be adopted for the reasons set forth by the magistrate judge, i.e., the action is against other defendants; the incidents occurred at another institution; the claim against one defendant, Smeal, is based upon *respondeat superior* liability; and prejudice to defendants in the instant case.

III. Conclusion

For the reasons stated above, this court will adopt the report and recommendation of the magistrate judge. An appropriate order will be issued.

s/Sylvia H. Rambo
United States District Judge

Dated: January 13, 2014.